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No. 85-628

Supreme Court, U.S.
FILED
NOV 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

KENNETH P. BIPPUS, et al.,
Petitioners,

vs.

LOCAL 100 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, et al.,
Respondents.

On Petition For A Writ Of Certiorari
To The Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS SDI READING CONCRETE, INC. AND IRVIN T. SCHARFENBERGER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS I

TABLE OF AUTHORITIES II

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. There Is No Reason For The Court To Consider Whether Filing An Unfair Labor Practice Charge With The NLRB Tolls The Statute Of Limitations For A Hybrid Section 301/Breach Of The Duty Of Fair Representation Suit 5

A. There Is No Conflict Among The Circuits 5

B. This Court Already Has Conclusively Decided The Principles That Control Petitioners' Tolling Question 6

II. The Court Should Not Consider In This Case Whether *DelCostello* Should Be Applied Retroactively Because This Issue Was Not Raised Below. Moreover, Applying *DelCostello* Prospectively Would Not Change The Judgment Because A Shorter Limitations Period Would Be Applicable .. 8

III. The District Court's Grant Of Summary Judgment Does Not Present Any Significant Questions That Would Warrant Supreme Court Review 10

CONCLUSION 12

APPENDIX:

Ohio Rev. Code Ann. § 2711.13 (Page 1981) 59a

TABLE OF AUTHORITIES

Cases	Page
Aarsvold v. *Greyhound Lines, Inc.*, 724 F.2d 72 (8th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 3538 (1984)	5
Adkins v. *International Union of Electrical, Radio & Machine Workers*, 769 F.2d 330 (6th Cir. 1985)	5
Aragon v. *Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir. 1985)	6
Bedat v. *McLean Trucking Co.*, 119 L.R.R.M. (BNA) 2945 (D. Conn. 1984)	5
Bey v. *Williams*, 590 F. Supp. 1150 (W.D. Pa. 1984)	5
Boyd v. *Teamsters Local Union 553*, 589 F. Supp. 794 (S.D.N.Y. 1984)	5
California v. *Taylor*, 353 U.S. 553 (1957)	9
DelCostello v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983)	4, 5, 6, 8, 9
Estades v. *Harry M. Stevens, Inc.*, 593 F. Supp. 778 (D.P.R. 1984)	5
First National Bank of Arizona v. *Cities Service Co.*, 391 U.S. 253 (1968)	10
Glover v. *United Grocers, Inc.*, 115 L.R.R.M. (BNA) 2441 (D. Ore. 1983), *aff'd*, 746 F.2d 1380 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2357 (1985)	5, 6
International Union of Electrical, Radio & Machine Workers Local 790 v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976)	6, 7
Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975)	6, 7

Page

Kolomick v. *United Steelworkers of America, District 8*, 762 F.2d 354 (4th Cir. 1985) 5

Lawn v. *United States*, 355 U.S. 339 (1958) 8

Lawson v. *Truck Drivers, Chauffeurs & Helpers, Local Union 100*, 698 F.2d 250 (6th Cir. 1983), *cert. denied sub nom. Leach* v. *United States Postal Service*, 464 U.S. 814 (1983) 9

Martin v. *Adams Distribution Services, Inc.*, 114 L.R.R.M. (BNA) 3562 (W.D. Mo. 1983) 5

Nicely v. *United States Steel Corporation*, 574 F. Supp. 184 (W.D. Pa. 1983) 5

Retail Clerks Union Local 648 v. *Hub Pharmacy, Inc.*, 707 F.2d 1030 (9th Cir. 1983) 6

United Parcel Service, Inc. v. *Mitchell*, 451 U.S. 56 (1981) 7

Vaca v. *Sipes*, 386 U.S. 171 (1967) 6, 10

Weed v. *East Texas Motor Freight Lines, Inc.*, 592 F. Supp. 713 (N.D. Tex. 1983) 5

Statutes

Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) 4, 9

Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 1

Title 42 U.S.C. § 1981 7

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 7

Ohio Rev. Code Ann. § 2711.13 (Page 1981) 1, 9

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STATUTES INVOLVED

In addition to those listed in the petition, Ohio Rev. Code Ann. § 2711.13 (Page 1981) may be involved. It is reproduced in the appendix at p. 59a.

STATEMENT OF THE CASE

This is a hybrid fair representation/Section 301 (of the Labor Management Relations Act, 29 U.S.C. § 185)

suit. It grows out of the sale by respondent Reading Central Mixed Concrete, Inc. ("Reading") of its business to respondent SDI Reading Concrete, Inc. ("SDI")[1] in January, 1981. The petitioners are former employees of Reading who were not hired by SDI. Respondent Teamster Local 100 (the "Union") was the bargaining representative for Reading's employees. Petitioners' claim against SDI and respondent Scharfenberger is based solely on their theory that SDI is the alter ego of Reading, and that SDI therefore violated Reading's collective bargaining agreement with the Union by "discharging" petitioners after it purchased Reading's business in January, 1981.[2] (A.16-18.)

The following facts, as stated in the District Court's opinion, are from the affidavit and deposition of petitioner Donald Browning. Browning was the union

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[1] The petition refers to this respondent as Reading Concrete, Inc. Its correct name is SDI Reading Concrete, Inc. SDI Reading Concrete, Inc. is a wholly owned subsidiary of SDI Industries, Inc., which is wholly owned by respondent Scharfenberger. Sup. Ct. R. 28.1.

[2] The facts regarding the sale are set forth in detail in affidavits that SDI filed with the District Court. Briefly, those facts are as follows.

In the fall of 1980, Reading was facing financial disaster. It sold its business to SDI, in a typical arms-length transaction for the sale of a depressed business. In 1981, SDI hired the best Reading employees and granted recognition to and negotiated a collective bargaining agreement with the Union.

In February, 1981, the Union filed an unfair labor practice charge with the NLRB claiming that SDI was bound by the Reading contracts as Reading's alter ego. The NLRB investigated and rejected the claim. The Union also filed a charge claiming that SDI's hiring practices were unlawful. This too the NLRB rejected.

The Union reneged on the agreement, and in March, 1981, the NLRB issued a complaint to enforce the agreement. In December, 1981, under an NLRB approved settlement agreement, the Union signed the contract that it negotiated with SDI.

steward for the Reading drivers. He filed the only grievances pertaining to petitioners' allegedly unlawful discharges and participated in the hiring of an attorney to file this lawsuit. (A.31-39.)

In preparation for the sale of its business to SDI, Reading laid off its employees effective the last working day of 1980 (A.31). On January 12 and 13, 1981, Browning filed grievances protesting the supposedly unlawful discharge of Reading employees (A.31).[3] Browning took the grievances to SDI supervisors (A.32). He told them that the discharges were unfair and that he was filing these grievances on behalf of the men he represented. Browning then took a copy of the grievances to Union president Gairald Kiser and Union business agent Ken Watson. (A.32.)

In response to the grievances, Kiser told Browning that Reading employees were "nothing but a burr under his saddle" and that "he'll be glad when [they] are all gone" (A.33). Also in January, Kiser told Browning that

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[3] The grievance and arbitration provision of the Reading drivers' agreement states in pertinent part as follows:

> (a) . . . [I]n the case of a grievance of an unjust discharge, the said grievant must file his grievance in writing within seventy-two (72) hours after the discharge. . . . In the event said grievances are not filed as herein provided, said discharge shall not be subject to arbitration.
>
> (b) The steward shall bring the grievance to the attention of a supervisor as promptly as circumstances permit.
>
> (c) If the steward and supervisor are unable to settle the matter it shall be referred to the Union and the Employer within twenty-four (24) hours.
>
> (d) The Union and the Employer shall meet within two (2) days, unless circumstances prohibit, or as soon thereafter as is possible, but in any event, they must meet within seven (7) days.

he was going to keep out of Reading's business and that "he would do nothing concerning Reading's grievances and he would not spend any more union money on [those] grievances" (A.33-34).

At a union meeting in January, 1981, Kiser and Browning had a disagreement. After that, Browning could not get any further response from Kiser. When Browning attempted to work through Watson, Watson said that he could not do anything without Kiser's authorization. (A.32-33.)

In late January, 1981, the Union lawyer, Bruce Pence, met with the Reading employees and told them that he could not do anything more for them (A.34). By late January or early February, 1981, Browning and the other petitioners had given up on their grievances. At that time, according to Browning, "as a group we decided that we needed to go on another route." (A.34-35.)

On November 16, 1981, petitioners filed this lawsuit, some nine months after they realized that the Union would not process their grievances. On September 30, 1983, SDI and Scharfenberger filed a motion for summary judgment on the ground that petitioners' claims were barred by the six-month statute of limitations set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), in accordance with *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983). The other respondents filed similar motions. (A.14-15, 23, 39.) Petitioners agreed that six months was the applicable limitations period (A.25-26). The District Court granted respondents' motions, and the Court of Appeals affirmed (A.12, 49).

REASONS FOR DENYING THE WRIT

I. There Is No Reason For The Court To Consider Whether Filing An Unfair Labor Practice Charge With The NLRB Tolls The Statute Of Limitations For A Hybrid Section 301/Breach Of The Duty Of Fair Representation Suit.

A. There Is No Conflict Among The Circuits.

Every lower federal court to consider the question since *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), has held that the filing of an unfair labor practice charge with the NLRB does not toll the six-month limitations period for a hybrid Section 301/fair representation suit. In addition to the Sixth Circuit in this case and in *Adkins* v. *International Union of Electrical, Radio & Machine Workers*, 769 F.2d 330, 335-36 (6th Cir. 1985), the Fourth and the Eighth Circuits have so held. *Kolomick* v. *United Steelworkers of America, District 8*, 762 F.2d 354, 355-57 (4th Cir. 1985); *Aarsvold* v. *Greyhound Lines, Inc.*, 724 F.2d 72, 73 (8th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 3538 (1984). *See also*, *Martin* v. *Adams Distribution Services, Inc.*, 114 L.R.R.M. (BNA) 3562, 3564-66 (W.D. Mo. 1983). District courts in the First, Second, Third, Fifth and Ninth Circuits have held that there is no tolling. *Estades* v. *Harry M. Stevens, Inc.*, 593 F. Supp. 778, 782-83 (D.P.R. 1984); *Boyd* v. *Teamsters Local Union 553*, 589 F. Supp. 794, 796-97 (S.D.N.Y. 1984); *Bedat* v. *McLean Trucking Co.*, 119 L.R.R.M. (BNA) 2945, 2946-47 (D. Conn. 1984); *Nicely* v. *United States Steel Corporation*, 574 F. Supp. 184, 187-88 (W.D. Pa. 1983); *Bey* v. *Williams*, 590 F. Supp. 1150, 1154 (W.D. Pa. 1984); *Weed* v. *East Texas Motor Freight Lines, Inc.*, 592 F. Supp. 713, 718-19 (N.D. Tex. 1983); *Glover* v. *United Grocers, Inc.*, 115

L.R.R.M. (BNA) 2441, 2442 (D. Ore. 1983), *aff'd*, 746 F.2d 1380 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2357 (1985).

The Ninth Circuit cases on which petitioners rely do not support a contrary conclusion. *Retail Clerks Union Local 648* v. *Hub Pharmacy, Inc.*, 707 F.2d 1030 (9th Cir. 1983), was decided before *DelCostello*, applied state tolling law, did not involve a hybrid Section 301/fair representation suit, and, as petitioners acknowledge (petition, p. 15), has no application here. *Aragon* v. *Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir. 1985), the case on which petitioners principally rely to support a conflict, did not hold that filing an unfair labor practice charge tolls the limitations period. In fact, no NLRB charge had been filed in that case, and the court declined to decide the issue. *Id.* at 1454. Significantly, in *Glover* v. *United Grocers, Inc.*, 115 L.R.R.M. (BNA) 2441, 2442 (D. Ore. 1983), *aff'd*, 746 F.2d 1380 (9th Cir. 1984), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2357 (1985), the District Court in the Ninth Circuit held, consistent with the other courts, that filing an NLRB charge does not toll the limitations period. There is no conflict here.

B. This Court Already Has Conclusively Decided The Principles That Control Petitioners' Tolling Question.

This Court's decisions in *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975), *International Union of Electrical, Radio & Machine Workers, Local 790* v. *Robbins & Meyers, Inc.*, 429 U.S. 229 (1976), and *Vaca* v. *Sipes*, 386 U.S. 171 (1967), foreclose petitioners' tolling argument and establish that the Court of Appeals correctly decided this issue. Accordingly, there is no sufficient reason to review it.

Johnson and *Robbins & Meyers* establish that pursuit of agency proceedings does not toll the limitations period for a court suit where the two proceedings provide independent (although related) avenues of relief and pursuing the agency proceedings is not a prerequisite to filing the court action. In *Johnson*, the Court held that the statute of limitations for a 42 U.S.C. § 1981 action is not tolled while a Title VII (of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*) charge is pending before the EEOC. In *Robbins & Meyers*, the Court held that pursuing the grievance procedure under a collective bargaining agreement does not toll the period for filing a charge with the EEOC under Title VII.

In *Vaca*, the Court held that a fair representation suit is independent of NLRB unfair labor practice proceedings. *Vaca* establishes that a fair representation suit and an NLRB charge are separate avenues of relief and filing an NLRB charge is not a prerequisite to filing a lawsuit. Accordingly, *Johnson*, *Robbins & Meyers*, and *Vaca* together establish that the limitations period in a hybrid Section 301/fair representation suit is not tolled during NLRB proceedings.

Moreover, this Court has consistently held that there is a strong federal policy favoring the prompt resolution of labor disputes. *See, e.g., United Parcel Service, Inc.* v. *Mitchell*, 451 U.S. 56, 63-64 (1981). Petitioners' tolling argument, if accepted, would violate this policy by unreasonably protracting labor disputes. When the NLRB issues a complaint, no enforceable decision results until after a hearing before an Administrative Law Judge, the adoption of the Judge's recommended decision by the NLRB, and an order by the Court of Appeals enforcing the NLRB's decision. This process can take many years.

There is no reason to review petitioners' tolling question.[4]

II. The Court Should Not Consider In This Case Whether *DelCostello* Should Be Applied Retroactively Because This Issue Was Not Raised Below. Moreover, Applying *DelCostello* Prospectively Would Not Change The Judgment Because A Shorter Limitations Period Would Be Applicable.

The decisions of this Court establish that it does not decide questions not raised or resolved in the lower courts, except in exceptional cases presenting exceptional circumstances. *Lawn* v. *United States*, 355 U.S. 339,

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[4] Also, this would not be an appropriate case to apply equitable tolling. Petitioner Browning, the union steward, who filed the only grievances pertaining to the petitioners' allegedly unlawful discharges and participated in the decision to hire an attorney to file this lawsuit, had no faith that the NLRB alter ego charge would succeed. Quoting from his deposition:

> Q. And you are aware that his charge [the Union lawyer's NLRB alter ego charge] was dismissed, aren't you?
>
> A. . . . Yes, I'm aware that his was dismissed. I knew they would be dismissed. . . . I knew that when all of this was going on [the pendency of the NLRB charge] that we should have something back there to try to help us, . . . our own private attorney. I knew that we should do that.
>
> Q. And that is what you were talking about in early February, getting the private attorney?
>
> A. Oh, I'm sure that private attorney was mentioned long before that, just to make sure our rights were safeguarded . . . I thought that that should have been all along, that we should have somebody besides the union with us. Because I knew how we had been jacked around.

Thus, petitioners attempt to excuse their untimely complaint by relying on the pendency of an NLRB charge, a charge which, at the time of its filing, they recognized was futile. These facts hardly justify equitable tolling.

362-63 n. 16 (1958); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957). Petitioners did not claim in either the District Court or the Court of Appeals that *DelCostello* should not be applied to this case. This case presents no exceptional circumstances. In fact, in the District Court, petitioners expressly agreed that *DelCostello* is applicable (A.25-26). They said in their memorandum opposing summary judgment that "[t]he Plaintiffs do not oppose Defendants' argument that the six-month Statute of Limitations, as set forth in Section 10(b) of the National Labor Relations Act . . . is controlling in this action pursuant to *DelCostello* [and] Plaintiffs concur with SDI and agree that the *DelCostello* decision should be applied 'retroactively' in this case. . . ."

Moreover, limiting *DelCostello* to prospective application would be of no help to petitioners. If the *DelCostello* six-month limitations period were not applicable to petitioners' claims, their claims would be subject to the three-month Ohio limitations statute for actions to vacate arbitration awards, Ohio Rev. Code Ann. § 2711.13 (Page 1981). In *Lawson* v. *Truck Drivers, Chauffeurs & Helpers, Local Union 100*, 698 F.2d 250 (6th Cir. 1983), *cert. denied sub nom. Leach* v. *United States Postal Service*, 464 U.S. 814 (1983), decided before *DelCostello*, the Sixth Circuit held that Ohio Rev. Code Ann. § 2711.13 applied to a hybrid Section 301/fair representation case which accrued in August, 1978 and was filed in October, 1980. Therefore, no purpose would be served by reviewing whether *DelCostello* should be applied to this case.

III. The District Court's Grant Of Summary Judgment Does Not Present Any Significant Questions That Would Warrant Supreme Court Review.

This Court has conclusively established the standards applicable to summary judgment. There is no reason to grant the petition to restate those standards, especially here, where the District Court, as affirmed by the Court of Appeals, did not depart substantially from those standards, but rather followed them to the letter. The District Court made no credibility determinations and did not weigh conflicting evidence. The District Court granted summary judgment based on the conclusive admissions of petitioners contained in Browning's deposition testimony and affidavit. It properly relied on these facts over which there could be no dispute. *See, First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 271, 285-87 (1968) (summary judgment against plaintiff is proper when it is based on admissions in his deposition testimony and corroborative evidence presented by defendant).

Clearly, the District Court correctly granted summary judgment. There was no dispute that petitioners' claims could only arise from the Union's refusal to take Browning's January 12 and 13, 1981 grievances to arbitration. That is the only breach of the duty of fair representation that would permit petitioners to sue SDI and Reading in federal court instead of pursuing their claims through arbitration. *Vaca* v. *Sipes*, 386 U.S. 171 (1967). The record before the District Court established beyond any factual dispute that, by late January or early February, 1981, petitioners knew or reasonably should have known

that the Union would not pursue the grievances.[5] Browning's deposition testimony demonstrates this:

> Q. So sometime approximately in January of '81 Kiser told you that he would do nothing concerning Reading's grievances. And he was referring to both the old grievances and the grievance that you had filed protesting the sale of the business, is that correct?
>
> A. Yes sir; the old and the new grievances.
>
> Q. . . . . Now, was it approximately this time, approximately January of 1981, after Kiser made those statements, that you decided you needed your own lawyer?
>
> A. As a group we decided that we needed to go on another route.
>
> Q. And why was that?
>
> A. Well, from the statements that was made from the union.

Browning testified unequivocally that, in January, 1981, Union president Kiser told him that he would do nothing more concerning the grievances. Kiser's affidavit testimony, which petitioners never disputed, confirmed this: "In late January, 1981 I informed Browning that the Union would not process these grievances further."

Therefore, petitioners' admissions, corroborated by other undisputed evidence, established that petitioners' claims accrued in late January or early February, 1981.

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[5] Petitioners do not dispute that this is the proper standard for determining when a cause of action accrues for statute of limitations purposes.

Petitioners agreed that six months is the applicable statute of limitations (A.25-26). Since this lawsuit was not filed until November, 1981, the District Court correctly granted respondents' motions for summary judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Ohio Rev. Code Ann. § 2711.13 (Page 1981) provides as follows:

> After an award in an arbitration proceeding is made, any party to the arbitration may file a motion in the court of common pleas for an order vacating, modifying, or correcting the award as prescribed in sections 2711.10 and 2711.11 of the Revised Code.
>
> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion, any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.